No. 11311

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

RAILWAY MAIL ASSOCIATION, a corporation,
*Appellant*,

vs.

JENNIE M. BABBITT, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT

CATLETT, HARTMAN, JARVIS & WILLIAMS,
and
JAMES G. MULROY,
*Attorneys for Appellant.*

1410 Hoge Building,
Seattle 4, Washington.



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**Cases Cited:**

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## BRIEF OF APPELLANT

### STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION OF THE DISTRICT COURT AND THIS COURT

Jennie M. Babbitt, as plaintiff, filed in the Superior Court of the State of Washington for King County, a complaint against Railway Mail Association (Tr. 2). Alleging diversity of citizenship and that the amount involved was more than $3000, the defendant, Railway Mail Association filed in the Superior Court of the State of Washington for King County, its petition for removal, and pursuant to such petition the cause was removed to the United States District Court for the Western District of Washington, Northern Division (Tr. 6, Tr. 9). The juris-

diction of the District Court was based on 28 U.S.C.A. 71 and 72. The cause was tried before a jury which returned a verdict in favor of the plaintiff and judgment was entered in favor of the plaintiff and against the defendant pursuant to said verdict. Appeal was taken to this Court which has jurisdiction upon appeal to review such judgment. 28 U.S.C.A. 255.

## STATEMENT OF CASE

Railway Mail Association was at all pertinent times and is now, a fraternal beneficiary association, conducted for the sole benefit of its members and beneficiaries and not for profit. It was organized and is existing for the purpose of providing closer social relationship among railway postal clerks, to enable them to perfect any movement that may be for their benefit as a class or for the benefit of the Railway Mail Service of the United States of America and to make provision for the payment of benefits to its members and their beneficiaries in case of death or permanent physical disability as a result of accidental means. The membership is limited to male railway postal clerks of the United States Railway Mail Service. (Pl.'s Ex. 2, Articles 1, 2 and 3, Constitution, etc. p. 4).

It has a beneficiary department to the privileges of which all its members are entitled.

The Constitution of the Association relating to the beneficiary department (Ex. 2, pp. 25-26, Article 16, Sec. 3 of the Charter) provides,

"Members leaving the Railway Mail Service

through removal, resignation or transfer (except an arbitrary transfer to another branch of the Government service, shall forfeit their membership in the Railway Mail Association."

Article 16, Section 9 (Pl.'s Ex. 2, pp. 31-32) provides for the payment of benefits in the event of accidental death, the payment being conditioned upon proof of death by accidental means alone of any member of the beneficiary department of the Association.

Fred I. Babbitt prior to February 1, 1924 was a member of the Railway Mail Association and on that date procured from it Plaintiff's Exhibit 1. This certificate on its face provides that the Charter or Articles of Incorporation, the Constitution and By-Laws of the Association and all amendments shall constitute a part of the agreement between it and the member. Mr. Babbitt was retired from the Railway Mail Service in 1928. At that time he was suffering from either multiple sclerosis or transverse myelitis, and for that reason was permanently and physically precluded from following such occupation. His association with the Railway Mail Service was completely severed and according to the Charter, Constitution and By-Laws of the Association he automatically ceased to be a member.

His physical condition became steadily worse and the disease effected a complete paralysis of his right leg. He fell in his home June 9, 1943, striking his *left* hip resulting in a fracture of the left femur or hipbone. He died in a Seattle hospital on the 30th of July following. Prior to the time of the accident

he had a complete paralysis of his *right* leg. His physical condition is illustrated by the succinct statement of one of his physicians, Dr. Rex B. Palmer dated July 9, 1943 (Pl.'s Ex. 4) where the Doctor stated:

> "This is a man of about 65 years of age that has had transverse myelitis over the past 15 years. He has almost a complete paralysis of his right leg. He was walking with difficulty and slipped on a floor rug, falling on his good leg and fractured his right hip. It was decided that a wall leg splint would be the best form of treatment for the fracture of the hip".

His widow brought action against Railway Mail Association to recover claimed death benefits under plaintiff's exhibit 1, alleging in her complaint, which was filed in the King County, Washington Superior Court in substance that Fred I. Babbitt died in Seattle, July 30, 1943; that the certificate was issued to him February 21, 1924 while he was a railway postal clerk in the railway mail service of the United States; that he became afflicted with multiple sclerosis and was retired as a railway postal clerk in 1928, and that from then until his death he was wholly and continuously disabled from following that occupation because of his physical condition and the multiple sclerosis with which he was afflicted; that he paid dues and special assessments to the Association during the remainder of his lifetime; that because of accepting these payments the Association modified the agreement consisting of the certificate (Pl.'s. Ex. 1) and the Charter, Constitution and By-

Laws, and waived the provision that there should be no compensation for bodily injuries received unless such should wholly and continuously disable the insured from following his occupation as a postal clerk, and further modified and waived any provision that accidental death should result independently and exclusively from any other cause, and further waived the provision that there should be no liability whatever under the certificate when disease, defect or bodily infirmity is a contributing cause of death, for the reason that the Association knew that the insured was suffering from multiple sclerosis and unable to follow his occupation as a postal clerk. Plaintiff further alleged that the insured slipped on a rug in his home in Seattle, fractured his left hip and died on July 30, 1943; that a claim was filed with the Association which was rejected.

Defendant answered the plaintiff's complaint (Tr. 9) denying all of these allegations except that the certificate was issued to the insured as alleged in the complaint and the death of the insured. The defendant specifically denied that there was any modification of the certificate and the Charter, Constitution and By-Laws of the defendant insofar as applicable to the insured or that any part of them was modified or changed. Plaintiff filed a reply (Tr. 15) which was stricken but which contained the statement,

> "* * * and the defendant became obligated to pay upon its beneficiary certificate even though Fred I. Babbitt was unable to perform the duties

of a railway postal clerk and even though the disease, defect or bodily infirmity he had on July 31, 1928 might have been a contributing cause of his death."

Plaintiff made a demand for a jury trial. The demand was stricken and the court ordered that the jury act only in an advisory capacity (Tr. 23). At the time of the trial the court ordered an oral amendment to the complaint, which changed the theory of the cause of action, changing it from an equitable to a legal one and eliminating entirely the issues raised by the pleadings existing at the time of trial that:

(1) The defendant modified the agreement between the parties and waived the provision that compensable bodily injury shall wholly and continuously disable the insured from following the occupation of a railway postal clerk, and

(2) also modified the agreement by waiving the provision therein that accidental death as therein defined as the sole result of accidental means alone, and

(3) also modified the agreement by waiving any provision contained in it that there shall be no liability whatsoever when disease, defect or bodily infirmity is a contributing cause of death,

because the defendant knew that the insured was suffering from a physical affliction to the extent

that he was unable to perform the duties of a railway postal clerk.

No amended complaint was filed. During some of the argument and exchange of views at the commencement of the trial and prior to ordering the amendment the court stated (Tr. 25) that the initial issue that must be disposed of before the trial could proceed to the second issue was whether the contract of insurance was modified and whether the insurer would be estopped from denying such modification. The court further stated (Tr. 26) that the insured must be in a physical condition to carry on his work as a railway mail clerk before liability arose under the contract of insurance and the court further expressed the view (Tr. 33) that it appeared to the court that before any recovery could be had or even any consideration of a recovery be taken, because of the status of the pleadings it would be necessary to establish a modification of the contract, either express or implied. Exceptions were taken to the order of the Court which without directing that an amended complaint be filed, contained the following ruling in regard to the complaint which was then on file (Tr. 46),

> "'* * * your complaint as I understand it, would now read, at least in a general way, it would contain the allegation that you have in Paragraphs I and II, and III, and IV I assume would be stricken.
>
> * * * * *
>
> "Mr. Jarvis: May I take an exception to the ruling striking Paragraph IV, Your Honor?
>
> * * * * *

"The Court: * * * Paragraph V would still remain in your amended complaint.

* * * * *

"The Court: Paragraph VI would be stricken:

"Mr. Jarvis: May I have an exception on the order striking Paragraph VI, for the reasons I stated in my argument?"

This took place before the jury was impaneled and the action was tried on the issues as so made up by the court with the original complaint available to the members of the jury showing no change or amendment on its face.

After the impanelling of the jury the trial then proceeded. Mrs. Jennie M. Babbitt, the beneficiary of the policy and the surviving widow, in substance testified that she was the surviving widow of the deceased and the beneficiary in the certificate (Tr. 48-49) and with a rather unusual amount of incompetent and prejudicial testimony which it was impossible to object to without creating a bad impression on the jury, and is illustrated by the following (Tr. 49):

"Q. When were you and Mr. Babbitt married?
A. June 18, 1902.
Q. And where? A. In Abilene, Kansas.
Q. Abilene, Kansas? A. In Abilene, Kansas.
Q. That is the General's home? A. Yes."

The materiality of this coincidence is quite striking and must have been of interest to the jury, as well as the fact that her oldest child, Frederick, had been in Germany 37 months and was still there. (Tr. 49-50).

Mrs. Babbitt then testified that her husband, the insured, was getting out of bed on the morning of June 9, 1943, when he fell on his left hip, breaking it and was taken to the hospital during the morning of that day. There was no mention made in Mrs. Babbitt's testimony of the fact that the insured's right leg was almost completely paralyzed as set out in his Doctor's statement (Pl.'s. Ex. 4). Although during Mrs. Babbitt's testimony that exhibit had been marked as such, it was not made available to the defendant as it was not offered until nearly the close of plaintiff's case during the testimony of one of plaintiff's experts (Tr. 104) and, was not available until then for the purpose of cross-examination. During Mrs. Babbitt's testimony (Tr. 91), plaintiff offered plaintiff's Ex. 5 which was admitted as an exhibit. This was a picture of the insured taken ten years before and was, over objection of defendant's counsel, admitted without other or further explanation, identification or expert testimony in regard to it.

Frank W. Fells, a business manager of the Seattle General Hospital brought into court and there was identified by him, an envelope which he stated contained x-rays and clinical reports pertaining to the insured, of none of which he had personal knowledge. He did not take them from the files of the hospital. They were not admitted in evidence until the plaintiff's last witness was testifying. This exhibit is a cardboard folder containing 4 x-ray pictures and at least 10 other records, none of which were iden-

tified, separately marked or explained in any way other than such testimony as Dr. Don Palmer (one of plaintiff's witnesses) gave in regard to the x-rays only and before they were offered and admitted. In addition to Mrs. Babbitt's testimony, plaintiff's case was practically made up of the testimony of two physicians, Dr. Don H. Palmer and Dr. Conrad Jacobson.

Dr. Palmer attended the deceased in conjunction with his son, Dr. Rex B. Palmer who was not available at the time of the trial. Dr. Don Palmer testified at the trial not only as to facts but also as an expert. He did not perform an autopsy or attend the decedent during the last days of his life. Dr. Rex B. Palmer made a medical proof of death (Df. Ex. A2) which reads as follows:

> "I, Rex B. Palmer, being first duly sworn, depose and say that I examined the body of Fred I. Babbitt, deceased, of Seattle, Washington, on the 29th day of July, 1943, at 7 P.M., and to the best of my knowledge and belief death resulted from the following causes:
>
> Fracture of left femur 7-9-43
> Multiple Sclerosis since 1928 (approx)
> Fat embolus to brain & lungs 7-17-43
>
> completely unconscious for 13 days prior to death.
>
> /s/ Rex B Palmer.

Dr. Conrad Jacobson, who was called as an expert, stated (Tr. 102) that he had never seen the insured; that he had had a conversation with Dr. Palmer; that he had examined unspecified and undesignated hospital records (Tr. 103); that he had examined part of the autopsy report (Df. Ex. A1);

that he had heard some of it discussed in the court room, and on this gave his opinion, both hypothetically and actually, as to the cause of death.

Verdict was rendered for the plaintiff. Defendant filed an alternate motion for judgment or new trial (Tr. 184) which was overruled and judgment was entered on the verdict, from which appeal was taken to this court.

## SPECIFICATIONS OF ERRORS RELIED ON

1. To recover under the certificate or insurance contract involved in this action (Pl.'s Ex. 1) the plaintiff must prove the existence of the policy; that the insured was a member of the defendant association in good standing at the time of his death; that he sustained an accident resulting in death; that death resulted wholly from accidental means and that disease, defect or bodily infirmity did not contribute to his death.

2. The court erred in permitting the amendment of plaintiff's complaint at the time of trial, changing the cause from an equitable to a legal one, triable by jury, and the Court erred in any event in not directing the filing of a written amended complaint, and the Court erred in disregarding the order previously entered directing the trial of any legal issue in the case by an advisory jury, and further erred in eliminating from plaintiff's complaint all questions of waiver of the terms of the contract (Pl.'s Ex. 1) and directing that all issues of fact be tried by jury.

3. The Court erred in overruling defendant's mo-

tion for a directed verdict at the conclusion of plaintiff's case (Tr. 118) both on the ground of insufficiency of plaintiff's evidence, and also because the evidence was such that any verdict of the jury could only be based on speculation and conjecture.

4. The Court erred in the admission of evidence including plaintiff's Exhibits 4 and 5 and technical evidence and opinion of doctors and answers to claimed hypothetical questions. (Full substance of testimony objected to and admitted is set out in the specification in regard to such error when discussed.)

5. The Court committed errors of law during the trial in addition to those hereinabove specified by

(a) Failing to direct the jury to bring in a verdict for the defendant at the conclusion of the plaintiff's testimony.

(b) By overruling defendant's alternative motion for judgment notwithstanding the verdict or for new trial.

(c) By entering judgment for the plaintiff.

## ARGUMENT

### Specification of Error 1

To recover under the certificate or insurance contract involved in this action (Pl.'s. Ex. 1) the plaintiff must prove the existence of the policy; that the insured was at the time of his death a member in good standing of the defendant association; that he sustained an accident resulting in death; that death resulted wholly from accidental means and that disease, defect or bodily infirmity did not contribute to his death.

Plaintiff's original complaint which was unamended up to the time of the impaneling of the jury at

the time of the trial alleged the issuance of the certificate (Pl.'s Ex. 1) to the insured, the payment of premiums (Tr. 4), the modification of the terms of this agreement, and the waiver of the provisions that accidental death shall result independently and exclusively of any other causes, and there should be no liability when disease, defect or bodily infirmity is a contributing cause of death. By such allegations plaintiff admitted in the plain language of the complaint that the defendant waived that portion of the certificate providing that there should be no liability if disease, defect or bodily infirmity should be a contributing cause of the death of the insured. By making such allegations in the complaint the plaintiff admitted that disease, defect or bodily infirmity was a contributing cause of the death of the insured, and such was part of the record. The Court directed that the complaint be orally amended at the time of trial. No written amended complaint was filed (Tr. 46-47). Having admitted that disease, defect or bodily infirmity was a contributing cause of death by alleging the waiver of the part of the policy denying benefits under it when such should contribute to the insured's death, plaintiff voluntarily injected and raised that issue and put the defendant to the defense of such issue, the plaintiff then, pursuant to order of Court, changed entirely her cause of action to a legal one to recover according to the terms of the policy. As a matter of law, exclusive of any fact which might be found by the jury or adjudicated by the Court, the defendant had admitted the death of the insured came within the terms of the exception contained

in the policy. No implied or actual waiver of any of the terms of the policy was proved. At the conclusion of plaintiff's testimony the record then showed that the plaintiff had admitted that disease, defect or bodily infirmity was a contributing cause of death by so pleading it in her complaint, and there was no proof that the terms of the policy the Charter, Constitution or By-Laws, had been waived or amended, actually or impliedly as there was no such pleading or issue.

There was no written amended complaint filed. The only amendment was contained in oral directions and orders of the Court (Tr. 46-47). The original written complaint was available at all times as part of the record for the inspection of the jury with all of its original allegations which were not part of the issues as finally framed over the defendant's objections (Tr. 46-47). We cannot speculate as to how these allegations and admissions may have influenced the minds of the members of the jury.

Sometime before the trial the plaintiff made a demand for a jury trial, which was stricken, and Judge Black who was then hearing matters in connection with the case subsequently ordered that a jury be impaneled at the time of the trial to act only in an advisory capacity (Tr. 23). As heretofore stated, at the time of the trial the Court ordered an oral amendment to the complaint changing the theory of the cause of action and eliminating entirely the issues raised by the pleading existing at the time of trial.

The failure of a party to serve the required demand

for a jury trial constitutes a waiver of a trial by jury. Failure to serve such a demand is a legal waiver whether it is inadvertent or intentional.

*McNabb v. Kansas City Life Ins. Co.* (C.C.A. 8), 139 F.(2d) 591.

The situation at the time of the trial was almost identical to the facts found in *Bercovici v. Chaplain*, 56 F. Supp. 417. There the district judge had ordered a non-jury trial of one count. The matter then came before another judge, the same as in this case before this court. After the first judge had ordered a non-jury trial, the plaintiff proposed an amendment to the count which had been ordered tried without a jury. The judge before whom the motion to make the proposed amended was urged, stated that another judge had ordered this particular issue to be tried without a jury; that the amendment would convert from an equitable one to an action at law and would bring about defeat of the first judge's order that the trial be without a jury. The judge further stated that he favored jury trials in cases having human elements, and

> "As I see it, the situation is this: The plaintiff elected to state the third count of the amended complaint in equity. Based on this the court directed that the count be tried without a jury. Now the plaintiff seeks to alter the phraseology of what, in essence, is fundamentally the same cause of action, so that (irrespective of his intention), if the proposed substitute were allowed, this cause of action would be triable by a jury. As I view the matter, such a result would

frustrate Judge Rifkind's order. I do not feel free to do that.

"Accordingly, if there be a ruling on the proposed new supplemental complaint as a whole, I think I am bound to deny the motion."

In order to avoid a dismissal of plaintiff's complaint at the conclusion of plaintiff's testimony (Tr. 118) it was necessary for the plaintiff to prove that the insured was a member of the Railway Mail Association at the time of his death and that the beneficial certificate was in force, and that the manner of the insured's death was within the terms of the policy to entitle the beneficiary to recover; or to prove a waiver of the constitution and by-laws of the Association and the terms of the policy because plaintiff's complaint and the pleadings show

(1) The defendant was not a member of the Railway Mail Service at the time of his accident and death within the meaning of the constitution and by-laws.

(2) The plaintiff's pleadings admitted that disease, defect or bodily infirmity was a contributing cause of death.

(Pl.'s Ex. 2, pp. 25-26, Article 16, Section 3 of the Charter, and Pl.'s Ex. 1).

Through the amendment of the complaint over the defendant's objections, all issues of waiver were eliminated entirely so that there was eliminated by the plaintiff from the pleadings and issues any question of waiver of Section 3, Article 16 of the Charter of the Association as well as any question of waiver of any restrictive terms of the certificate. After

the issues were finally made there was no pleading, proof or record of any legally effective waiver binding upon the Association of any of the terms of the constitution, by-laws and policy, and, therefore, plaintiff's complaint as purported to be amended and the issues as finally tried with plaintiff's admissions that the insured left the Railway Mail Service before his death and the additional admission that disease, defect or bodily infirmity contributed to death, neither constituted nor made a cause of action against the defendant.

In *McKillips v. Railway Mail Association*, 10 Wn. 2d 122, 116 P.(2d) 330, a similar contract was discussed and the Supreme Court of this state stated that

> "The wording of the certificate before us above quoted is definite and precise. * * * This language is plain and unambiguous, and the courts have no authority to enlarge appellant's liability under its contract beyond the plain terms thereof."

In *Metropolitan Life Ins. Co. v. Foster* (C.C.A. 5), 67 F.(2d) 264, the court stated:

> "We have no more right to enlarge the liability by artificial construction of the policy than to increase the penalty of a bond or raise the face of a promissory note."

In *Order of the United Commercial Travelers v. Nicholson* (C.C.A. 2), 9 F.(2d), 7, the court stated in referring to a similar contract,

> "These various provisions constitute a part of the contract which these parties made, and by which their rights are to be determined."

There is no record or proof in this case that any local officer of the Association was authorized to waive, alter, or amend any terms of the constitution, by-laws or the policy, and any attempted waiver would be in excess of the authority of any such officer and the insured charged with notice that such officer would be exceeding his authority.

*National Council, J.O.U.A.M. v. Thompson*, 153 Ky. 636, 156 S.W. 132, 45 L.R.A. (N.S.) 1148.

**Specification of Error 2**

The Court erred in permitting the amendment of plaintiff's complaint at the time of trial changing the cause from an equitable to a legal one, triable by jury, and the Court erred in any event in not directing the filing of a written amended complaint, and the Court erred in disregarding the order previously entered directing the trial of any legal issue in the case by an advisory jury, and further erred in eliminating from plaintiff's complaint all questions of waiver of the terms of the contract (Pl.'s Ex. 1) and directing that all issues of fact be tried by jury.

The argument in regard to this Assignment of Error is largely set out under Assignment of Error 1. The situation in regard to defendant's demand for trial by jury is almost identical to that which existed in *Bercovici v. Chaplain, supra.*

**Specification of Error 3**

The Court erred in overruling defendant's motion for a directed verdict at the conclusion of plaintiff's case (Tr. 118) both on the ground of insufficiency of plaintiff's evidence, and also because the evidence was such that any verdict

of the jury could only be based on speculation and conjecture.

We believe that the testimony of Dr. Conrad Jacobson and his opinions were entirely incompetent. The only other testimony that the deceased's death came within the terms of the policy was that of Dr. Don H. Palmer who made certain statements in regard to it which we believe were solely within the province of the jury. Eliminating the irrevelent and incompetent testimony, there is nothing in the record except supposition and speculation as to the cause of death. For instance, the record shows that the deceased was suffering at the time of his death from arterial sclerosis (Df. Ex. A1) as well as multiple sclerosis and transverse myelitis. Dr. Jacobson was asked in referring to whether or not the deceased could have died from disease the following question and gave the following answer (Tr. 115):

"Q. Could he have had it from arterial sclerosis?

A. I don't think so. It is all supposition."

Dr. Don Palmer (Tr. 96) testified that he entirely agreed with Dr. Rex Palmer's diagnosis of the case and they were associated together on it. Dr. Rex Palmer swore that to the best of his knowledge and belief death resulted from three causes: Fracture of the left femur, multiple sclerosis, and fat embolus to brain and lungs (Df. Ex. A2).

The case is squarely within the wording of *Atchison, etc. v. Toops*, 281 U.S. 351, 74 L. ed. 896, 50 S. Ct. 281, where the Supreme Court stated:

"The jury may not be permitted to speculate

> as to its cacse, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

Also, *Patton v. Texas & Pacific, etc. Co.*, 179 U.S. 658, 45 L. ed. 361, 51 S. Ct. 275, where the Supreme Court stated:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

And also, *Mutual Life Ins. Co. v. Hassing* (C.C. A. 10) 134 F.(2d) 714, where the Court stated:

> "But it is not essential to a verdict for the defendant that the evidence should repel any other hypothesis than the one advanced by it. It is incumbent upon plaintiff to take the case from without the realm of speculation, conjecture and surmise and create a factual basis from which a reasonable inference can be drawn. Failing in this, plaintiff cannot prevail."

The plaintiff did not sustain the burden of proof that the fall was caused by accidental means alone and that disease, defect or bodily infirmity did not contribute to the cause of the fall. Plaintiff showed by her own testimony that the insured had almost a complete paralysis of his right leg (Pl.'s Ex. 4, Personal History Sheet). There is nothing in the

record at all indicating the fall was caused by accidental means and the accidental element of the fall comes squarely within the following:

*New England Mutual Life Ins. Co. v. Flemming* (C.C.A. 9) 102 F.(2d) 143, where the court stated:

> "Moreover, in the absence of a showing of some accidental means causing the fall it cannot be said that the fall alone was proof of accidental means for it is quite as likely to result from some bodily infirmity. The burden of proof was upon the plaintiff."

Also, *Wallace v. Standard Acc. Ins. Co.* (C.C.A. 6) 63 F.(2d) 211, were the court stated:

> "There was medical testimony tending to show that the insured died as a result of cerebral hemorrhage superinduced by the fall or some damage to his skull caused by the fall, but we find no substantial evidence to support the essential allegation of the petition that the fall itself was caused by stumbling independently and exclusively of any and all other causes. There is no room for any presumption that it was so caused. This was purely a question of fact and the burden was upon appellant."

The certificate provides

> "Accidental death shall be construed to be either sudden, violent death from external violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone. There shall be no liability whatever

> when disease, defect or bodily infirmity is a contributing cause of death."

The obvious purpose of the certificate is to protect the members of the Association while engaged in their occupation of railway mail clerks. As the name implies, the members of the Association handle and sort the mail on moving trains. The occupation is more hazardous than the usual one and the purpose of the certificate is to protect the members and the beneficiaries from the accidental hazards of such occupation. As heretofore stated, Article XVI, Section 3, of the Charter, Constitution, and By-Laws, which relates to the beneficiary department of the Association, provides that members leaving the mail service forfeit their membership in the Association. The certificate specifically provides that the accidental death must result from accidental means * * * or death within one year as the sole result of accidental means alone. As frequently stated by the courts, an accidental result which is not caused by accidental means does not come within the terms of this or a similar policy. The same kind of policy was before the Court of Appeals in *Railway Mail Association v. Stauffer*, 152 F.(2d) 146.

The Court there held that the plaintiff's evidence did not support the judgment, and the facts are so similar and the reasoning so applicable to this case that we take the liberty to quote at the following length from the Court of Appeal's decision:

> "It will thus be seen that the insurance company did not agree to be liable for *any* accidental

death, but only for (a) a sudden death which was caused by 'external, violent and accidental means,' or (b) death within one year as the sole result of accidental means. The 'accident' relied on by the appellee in the count of the complaint involved in this appeal was the attempt to move, and the consequent rupture. It occurred very shortly before death. So, the death was sudden, but there is no proof that it was caused by external, violent and accidental means. For the insurer to become liable, the death must result 'directly from such accidental means, independently and exclusively of any other causes.' It is to be noted also that the contract stipulates that 'There shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.'

"* * * We are of the opinion that the evidence in the case at bar does not establish liability as defined in the certificate of insurance. There is no proof that any unforeseen or unintended condition or combination of circumstances, external to the decedent's body, contributed to his death. Nor does the evidence show that there was anything accidental, unforseen, involuntary or unexpected in Stauffer's effort to rise. Mrs. Stauffer is the only witness who testified, or could have testified, about what took place at that time. She said nothing in her description of the incident on which there could be based an inference that the means which Stauffer voluntarily employed to get out of bed included anything unforeseen, unexpected or unusual. In this, the facts of the present case differ from the facts considered by the Supreme Court in *U. S. Mutual Accident Association v. Barry*, 131 U.S. 100, 9 S. Ct. 755, 33

L. ed. 60. There Dr. Barry voluntarily leaped from a platform four or five feet to the ground below. He suffered an injury from which death resulted, although previously he had been a vigorous, sound and healthy man. The Supreme Court held that the trial court had acted properly in leaving it to the jury to determine whether after Barry left the platform, or in the act of alighting, there was some unexpected or unforeseen or involuntary movement. In the present case there was no such question to submit to the jury, nor was Stauffer sound body before he attempted to raise himself by his elbows; on the contrary, his body was frail and diseased, except for which the movement could not have caused the hemorrhage.

"As the company agreed to pay only if accidental means caused an injury which produced death, independently and exclusively of any other causes, it follows that the evidence does not support the judgment."

In the instant case before this Court the only testimony about the means which established the accidental result, as in the *Stauffer* case, is the testimony of the beneficiary of the policy. In each instance the beneficiary was alone with the insured. The beneficiary in the *Babbitt* case testified that he stood up (Tr. 53) to pull on the arms of his underwear and he turned to get the sleeve in on the first side. At that time he was standing on a rug which was loose at the corner and he slipped and fell on his left side. The only movement that he made was to put his left arm into the arm of the underwear (Tr. 85).

The insured at this time was suffering from almost

a complete paralysis of his right leg (Pl.'s Ex. 4). There was no physical movement preceding the fall other than the attempt to put one of his arms into the arm of the underwear. The standing up on the rug was not an accidental means. It was a voluntary action on his part. The twisting of the body was not an accidental means as that was also a voluntary action on the insured's part. It is self-apparent in view of the facts in this case that the rug could not have slipped of its own accord. Prior to falling the insured was perfectly balanced and firm (Tr. 85). There is no testimony that the rug slipped which would have been a physical impossibility without a movement on the insured's part, and there is no testimony that the fall caused the rug to slip or the slipping of the rug caused the fall. If the fall caused the rug to slip there was no accidental means causing the accidental result. The fall could have been caused by the paralysis of the right leg. The rug could not have slipped without a physical movement by Mr. Babbitt. If turning his arms and shoulders was this movement which caused the rug to slip, that was voluntary on his part and was not an accidental means. No matter how unfortunate the accidental result may have been there is no testimony in the record in this case, and there could not be, that the rug slipped before he started to fall so that the slipping of the rug must have been caused either by a voluntary act on his part, which of course was not an accidental means, or was caused by the fall.

The fall could have been caused by the paralyzed right leg and the facts and applicable law on this point are practically the same, as in:

*Wallace v. Standard Acc. Ins. Co., Supra,*

*Railway Mail Ass'n. v. Stauffer, Supra,*

and *White v. New York Life Ins. Co.* (C.C.A. 5) 145 F.(2d) 504, where the Court stated:

> "By the weight of authority a means is not made accidental because some unexpected result follows in addition to that which was intended to be accomplished."

The fall itself did not establish an accidental result caused by accidental means. There is no question that the burden of proof was on the plaintiff to establish not only an accidental means but the accidental result. The statement that he slipped on a rug does not establish the accidental means. In the *Wallace* case, the Court stated:

> "* * * but we find no substantial evidence to support the essential allegations of the petition that the fall itself was caused by stumbling independently and exclusively of any and all other causes. There is no room for any presumption that it was so caused. This was purely a question of fact and the burden was upon appellant."

Judge Wilbur stated in *New England Mut. Life. Ins. Co. v. Flemming, supra*:

> "* * * Moreover, in the absence of a showing of some accidental means causing the fall it cannot be said that the fall alone was proof of accidental means for it is quite as likely to

result from some bodily infirmity. The burden of proof was upon the plaintiff."

**Specifications of Error 4**

**Admission of Plaintiff's Exhibit 4**

The Court erred in the admission of evidence including plaintiff's Exhibits 4 and 5 and technical evidence and opinion of doctors and answers to claimed hypothetical questions.

FRANK W. FELLS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Will you tell the Court and jury your full name? A. Frank W. Fells.

Q. Frank W. F-e-l-l-s? A. Right.

Q. And what is your business, Mr. Fells?

A. Business manager of the Seattle General Hospital.

Q. And how long have you been the business manager of the Seattle General Hospital?

A. Going on fourteen years.

Q. Fourteen years? A. Yes.

Q. And in your capacity as general manager of that hospital, are the hospital records under your general supervision? Do you have general custody of them? A. Yes, sir.

Q. Now in response to a subpoena duces tecum,

have you brought with you X-rays and clinical reports—that is, the clinical reports and X-rays appertaining to Fred I. Babbitt?

A. Yes I have.

M. Savage: May I have them, please?

Q. These are a part of the permanent records of the Seattle General Hospital?

A. That is right.

Q. And are kept in the regular course of your business as a general hospital, is that right?

A. Yes, sir.

Q. Now you don't know anything about the details of the exhibit, what they contain—that is, you did not write them up or take the X-ray pictures, is that right? A. Yes, sir.

Mr. Savage: You may cross-examine.

Cross-Examination

By Mr. Jarvis:

Q. You have no personal knowledge of the contents, Mr. Fells? A. No.

Q. You don't know what doctors or technicians prepared those, do you? A. No.

Q. You just took them out of the file in the hospital?

A. I had the record clerk in charge take them out.

Q. You did not do it yourself?

A. No.

The Court: As I understand, you have offered them?

Mr. Savage: Not yet, no. That is all.

(Witness excused." (Tr. 66-67)

Mr. Savage: First of all, Your Honor, please, I offer in evidence Plaintiff's Exhibit 4 for identi-

fication, which are the X-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently identified in this case and for that reason I do (not) object to them.

The Court: The X-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were identified as a part of the permanent records of the Seattle General Hospital by Mr. Fells, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4). (Tr. 104-105)

In the State of Washington, hospital records are regarded as hearsay testimony and are inadmissible. *Toole v. Franklin Inv. Co.*, 158 Wash. 696, 291 Pac. 1101 has never been overruled in this State. In that case it was directly decided that

> "The rule seems to be well established that such records are hearsay testimony, * * * We must, therefore, hold that these records are inadmissible."

(Records referred to are hospital records).

*Dunn v. Buschmann*, 169 Wash. 395, 13 P. (2d) 69.

The most serious objection to the introduction of the hospital records, is the fact that a folder was introduced containing a still unnumbered, unmarked collection of papers, X-rays and other reports, documents, papers and writings. No effort was made to associate a large part of these with the case or identify them as applicable or explain them. We don't know now the number of them, nor the relevancy nor the materiality, other than the mere fact that they purport to be hospital records. When or how or under what circumstances they were made, whether in or out of the hospital, by a nurse or attendant, and what they were intended to prove or explain was left entirely unexplained. They weren't even numbered or identified so as to give the defendant an opportunity to identify them, object to them or make any record in regard to them. It was as though a brief case had been introduced containing an unspecified, unidentified number of photographs, papers and documents by identifying the case or container. Certainly neither the folder itself nor the fact that it contained papers, documents and photographs was relevant or material. Possibly some of the X-rays were used in Doctor Palmer's testimony but they were not marked nor identified. None of the other contents of this folder were referred to except as hospital records or identified or numbered as exhibits. If it was necessary to use expert testimony to explain the cause of death certainly the jury could not deduce that death was caused either from disease or bodily defect or accident, from an unexplained and unidentified mass of

technical and medical terms, phraseology and records, admittedly unintelligible to the layman and which it was necessary in a proper way to explain by the person who made such records or the doctor in attendance or at least by expert testimony. To show the position that we were placed in, Dr. Jacobson testified that his conclusions were based on hospital records examined prior to the trial. We don't know what records he examined, whether those introduced and whether all or part. We do not believe that we have to go on the indefinite conclusion that the unspecified, unidentified and unexplained contents of a folder contain all or part of records examined by this expert or the other doctor and whether they are all or part of the entire record in Mr. Babbitt's case. It must be remembered that the entire folder or envelope was introduced as one exhibit. (Plaintiff's Exhibit No. 4). It went to the jury with all its unidentified and unexplained contents.

The vice of such a situation is illustrated by *Oxford Paper Co. v. U. S.*, 56 F.(2d) 895, where the Court stated:

> "The mere filing of a document or instrument with the clerk is neither offering or introducing it in evidence;"

In our case we don't even know now what instrument, photograph or document contained in the hospital records was referred to by either of the doctors nor do we know which X-rays or photographs Dr. Palmer testified about or which one Dr. Jacobson examined.

"However, it has been held that where documentary evidence is offered, each piece should be presented by itself to the court, exhibited, if desired, to the opposing counsel, identified by the court or steographer with suitable marks, and, if objected to, its genuineness established by testimony. * * * Documentary evidence should not be introduced in gross. Letters should not be admitted in mass for the jury to read or not as they please." 64 C. J. 115

In *Schmeller v. United States* (C.C.A. 6) 143 F. (2d) 544:

The Court stated:

"A more difficult question is presented by the contention that the court committed prejudicial error in its instructions to the jury on the evidence. The court admitted Exhibits 1 to 46 en masse. This constituted a group of documents, some unsigned and some containing hearsay, taken from the files of and kept in the regular course of business by the Foundry Company, and stated to have been made, or 'presumably' to have been made at or about the time of the transactions to which they refer. They were admitted as falling within the purview of Sec. 695, Title 28, U.S.C., 28 U.S.C.A. Sec. 695. As to certain of these documents we think that this admission en masse was error. The purpose of the enactment of Sec. 695 was to eliminate the technical requirement of proving the authenticity of business records and memoranda by the testimony of the maker. *Landay v. United States*, 6 Cir., 108 F.(2d) 698, 705. The mere fact that the paper offered in evidence is taken from a business file and is otherwise proved in compliance with Sec. 695 does not establish its competency. It is ques-

tionable whether all of the papers offered in evidence in this mass of exhibits were made as memoranda or records. It is also questionable whether all of the matters to which they related were relevant. Section 695 in no way repealed the ordinary requirements of relevancy and competency. The District Court should have examined and ruled upon each paper separately, and should have excluded the hearsay and other incompetent evidence."

Assume the admissability under Title 28, U.S.C., 28 U.S.C.A. 695 the facts in this case come squarely within the statement of the Court in the Schmeller case in which the Court said that the admission of the documents en masse was error. In the case before this Court we have a number of unspecified, unmarked papers, documents, photographs, reports, receipts, certificates, opinions, and histories some of which undoubtedly are immaterial, such as the receipt for the body, the list of clothing and other papers which were not made a part of the record. In the Schmeller case the exhibits were numbered although admitted en masse. In the Babbitt case the exhibits were not even numbered or identified but an envelope containing an unidentified and unspecified number of papers was admitted over objections.

**(b) Admission of Plaintiff's Exhibit No. 5**

Q. Directing your attention to what has been marked Plaintiff's Exhibit 5 for identification, Mrs Babbitt, can you tell us what that is?

A. This is a picture of my husband. taken approximately ten years ago.

Mr. Jarvis: Your Honor, I don't know as this picture is relevant. I object to it on that ground.

The Court: It is relevant unless it is taken too remote in time. She says it was taken—

Q. Was it taken after he retired from the Raliway Mail Service?

A. Yes, about four years afterwards.

Mr. Savage: I offer it then. Ithink it is material with respect to his condition.

Mr. Jarivs: It is 1932, Your Honor.

Mr. Savage: After counsel contended he had been diagnosed suffering from a defect which, under the terms of their answer, contributed to his death, and I think that his appearance as indicated by this picture is material.

The Court: The objection will be overruled. It may be admitted in evidence.

Mr. Jarvis: Exception, Your Honor. (Tr. ....)

Plaintiff, over defendant's objection, introduced in evidence plaintiff's Exhibit 5, a picture of Mr. Babbitt while Mrs. Babbitt was on the witness stand. At the time the picture was introduced in evidence it was referred to by Mrs. Babbitt in probably a not unnatural tearful manner. Mr. Babbitt died in the summer of 1943. The picture, it developed on cross-examination, was taken in 1932. It was admitted it was not taken for the purpose of establishing any medical history or condition of the subject of the photograph. It was an ordinary picture such as is usually taken for a family purpose. It added nothing to any testimony as to the physical and mental condition of Mr. Babbitt. It was apparently and purely put in for the sole purpose of influencing the jury,

and as such we believe it was not material and certainly was prejudicial.

By calling expert witnesses the plaintiff admitted the necessity of expert testimony. No members of the jury could determine from a photograph taken under unknown circumstances and conditions in 1932, whether or not Mr. Babbitt was suffering frfom a disease, the course, duration and extent of which was entirely internal and which could only be but was not described by expert testimony. The immateriality of the photograph is illustrated by the fact that it was not referred to in any way or at any time in the testimony of either of the doctors called by plaintiff. A photograph of Mr. Babbitt during his last illness or of his body after his death might have been made relevant than a photograph made in 1932, but certainly would not have been, in any event, material unless it proved a part of plaintiff's case. What part of plaintiff's case was proven by the photograph? Counsel goes on the assumption that the photograph itself is all that is necessary to prove conclusively its materiality and relevancy. It did not prove, in any way, the course, duration or condition of the disease at the time the photograph was taken. Obviously from a layman's point of view it couldn't do so even if that was an issue in the case. It was not used in any of the expert testimony. There was no testimony by the photographer or maker of the photograph that it was a simile of its subject or had not been retouched. It was used purely and purposely to influence the jury. It was marked, offered and intro-

duced over objection, referred to by the plaintiff, who then wept. She was admonished by counsel to attempt to control herself, solicitiously asked if she were able to do so. The photograph was then, under these conditions, handed to the jury, inspected by each one of the jury, and never again referred to in any of the testimony. Such an apparent disregard of what should be an impassionate representation of facts is certainly alien of aspects of a trial fair to a defendant insurance association, which at best is always laboring under disadvantage. Mrs. Babbitt, not being an expert, could not testify that the phototograph either showed or did not show the course of disease or latent physical condition. The fact that the photograph was not used in the examination of either of the experts certainly showed its immateriality from a medical point of view and its apparent emotional appeal. The deceased died in July, 1943, not in 1932. Other than the fact that he had been afflicted with multiple selerosis continuously since about 1926, his physical appearance prior to a short time before his death had no materiality, unless on the issue of waiver as pleaded in plaintiff's complaint. However, the question of waiver was eliminated by the Court in its recasting of plaintiff's pleadings so that it was not material on that or any other issue.

> "Photographs should be excluded where they are irrevelant or immaterial. They should be excluded where they would confuse or mislead rather than aid the jury, distract the jury's attention from the main issue, or unduly em-

phasize the claims or the evidence of one of the parties, or where the natural effect of their introduction in evidence would be to arouse the sympathies or prejudices of the jury, rather than to throw any real light on the issues. " 32 C.J.S. 612

In *United States v. LaFavor* (C.C.A. 9), 72 F.(2d) 827) this Court reversed a case on the sole ground that an X-ray photograph was not sufficiently identified.

In *Finholt v. Seattle*, 139 Wash. 497, 247 Pac. 950, the Supreme Court of the State of Washington refused to admit pictures that were not taken under conditions sufficiently similar to those at the time of the accident to have them do more than confuse.

The only one who could or did testify in regard to the photograph was Mrs. Babbitt but any testimony that she might have given to explain the physical condition of the decedent would have been entirely incompetent.

> "Where the disease is one the existence of which is discoverable only by a skilled physician by the ascertainment of existing symptoms, the question of whether such disease exists is not established by testimony, based only on observation of such person's outward appearance, that he then seemed to be in good health." *Scharlach v. Pacific Mutual Life Ins. Co.* (C.C.A. 5) 16 F.(2d) 245. The existence of this specific disease was a strictly medical question; the conclusions of laymen upon such an issue are without adequate basis, and, necessarily, mere speculation." *United States v. Clapp* (C.C.A. 2) 63

F.(2d) 793, 794. *Aetna L. Ins. Co. v. Kelley* C.C.A. 8) 70 F.(2d) 589, 93 A.L.R. 471.

**Specification of Error 4**

**(c) Admission of Dr. Palmer's Testimony and Opinions**

Q. *Well, Doctor, tell the Court and Jury whether in your opinion—whether or not Fred I. Babbitt died of a fat embolus which went to his lung and his brain?*

Mr. Jarvis: Your Honor—just a minute, I object to that question on the ground that the witness is not permitted to testify as to the matter that must be decided by the jury, and that has been so decided.

The Court: Objection will be overruled.

Q. Now, Doctor, assume that Fred I. Babbit was suffering from multiple sclerosis, or a transverse myelitis, and he had an accidental fall, with a fracture of the femur, and a terminal death due to a fat embolus going to the lung and the brain, in your opinion, would the multiple sclerosis or transverse myelitis be a contributing cause of death? A. No.

Q. If Fred I. Babbit had never been afflicted with multiple sclerosis or transverse myelitis, and he had sustained a fall in which the large bone, or femur was fractured—sustained a comminuted fracture, which is broken up—in your opinion would death have probably resulted anyway?

A. Yes.

Mr. Jarvis: I ask that that answer be striken, Your Honor, on the same grounds. I want to preserve that record.

Mr. Savage: You may cross-examine. (Tr. 77-78)

The foregoing testimony of Dr. Palmer is incompetent, irrevelant and immaterial for the reasons that:

(a) The Doctor could not give his opinion either as an expert or otherwise on the ultimate facts to be passed upon by the Court or jury.

(b) The questions did not purport to contain the record or evidence in the case. If the second question is a continuation of the first it purports to be a hypothetical question based on an assumption which obviously does not cover the evidence in the case, or that introduced and in the record at the time the Doctor was testifying. For instance, there is no evidence that the insured was suffering from either multiple sclerosis or transverse myelitis. The record is that he was suffering from both. At least, the plaintiff's own doctors had so diagnosed. The question does not contain any time element or the extent or the duration of the disease with which the insured was suffering nor the extent, duration or seriousness of them, nor does the question purport to cover the hospital records which were either prepared by this Doctor or his son, who was associated with him on this case.

The second question is obviously more objectionable as it likewise is asking for an ultimate conclusion which is for decision by either the Court or jury and being a hypothetical question it does not purport to cover the facts in the case surrounding the fall or injury, its severity or extent and certainly is based on the wrong hypothesis in that the record shows at that

time the insured had been prior to his death afflicted with disease, defect and bodily infirmity, whereas, the opinion of the Doctor is asked on an assumption of erroneous facts based on a supposed record or evidence that the deceased had never been afflicted with any disease, defect or bodily infirmity.

See also *Harrison v. New York Life Ins. Co.* (C.C. A. 6) 78 F.(2d) 421, and the decisions of this Court in *Deadrich v. U. S.*, 74 F.(2d) 619, and *U. S. v. Stephens*, 73 F.(2d) 695.

Moreover, it is the law in Washington that hypothetical questions propounded on direct examination must be based upon the testimony and evidence in the case and not upon suppositions. *Levine v. Barry*, 114 Wash. 623, 195 Pac. 1003. *Jones v. McQuesten*, 172 Wash. 480, 20 P.(2d) 838; *Newton v. Pac. Hwy. Trans. Co.*, 18 Wn.(2d) 507, 139 P.(2d) 725,

In *U. S. v. Spaulding*, 293 U.S. 493, 79 L. ed. 617, the Supreme Court stated:

> "The medical opinions that respondent became totally and permanently disabled before his policy lapsed are without weight. Clearly the experts failed to give proper weight to his fitness for naval air service or to the work he performed, and misinterpreted 'total permanent disability' as used in the policy and statute authorizing the insurance. *Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have*

*been asked or allowed to state their conclusions on the whole case."*

**Specification of Error No. 5**

**(d) Admission of Testimony of Dr. Conrad Jacobson**

Q. Doctor, did you ever know Fred I. Babbitt?

A. I never saw him. I am only familiar with his history, *and my conversation with Doctor Palmer.*

(Testimony of Dr. Conrad Jacobson.)

Q. Have you examined the hospital records in the Seattle General Hospital?

A. I have examined the hospital records, yes.

Q. And during the time you were in the court room, I will ask you, Doctor, if you did not read and examine the Defendant's Exhibit A-1, which is an autopsy report of Fred I. Babbitt by Alfred L. Balle, pathologist?

A. I saw part of it, *and I heard some of it discussed here* in the court room.

Q. Doctor, reading to you from the anatomic diagnosis of Defendant's Exhibit A-1, item 1, fracture of left femur; 2, hemorrhagic infarct of both lungs, extensive infarction of the pons overlying the ventricles with area of necrosis and slight hemorrhage.

Tell, us, Doctor, whether you as an expert are able to form an opinion as to the cause of Fred I. Babbitt's death?

Mr. Jarvis: Your Honor, I object to that question as incompetent, irrelevant and immaterial, and as not covering the issues or the facts as developed in this case, and because it is based, or attempted to be [243] based on some records that is not produced nor in evidence in this case.

The Court: I understand the question is based not only on the reading there, but upon the doctor's examination of the hospital records, indicating when the patient came in——

Mr. Savage: Yes, and the reading of the Defendant's own exhibit, Your Honor.

(Testimony of Dr. Conrad Jacobson.)

The Court: Independent of any previous history perhaps, would not be a sufficient hypothesis to base an opinion, but if he is familiar——

Q. Basing your opinion upon the hospital records you have examined and the reading I have made just now——

Mr. Jarvis: May I have a further objection that the hospital records are not in this case at all.

Mr. Savage: They have not been admitted, but the doctor testifies that he did read them at the Seattle General Hospital.

Mr. Jarvis: That, Your Honor, is injecting an element into this case that is entirely outside of it right now.

The Court: I think perhaps you better frame your question a little broader, taking the history of this case from the date of the accident and as you contend the nature of the accident. [244]

Mr. Savage: First of all, Your Honor, please, I offer in evidence Plaintiff's Exhibit 4 for identification, which are the X-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently

identified in this case and for that reason I do (not) object to them.

The Court: The X-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were identified as a part of the permanent records of the Seattle General Hospital by Mr. Fells, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4).

Q. Now Doctor, taking into consideration the examination which you made of the hospital records at the Seattle [245] General Hospital of Fred I. Babbitt, of his disability from July 9 to July 30, inclusive, the day that he died, and also taking into consideration this language from Defendant's Exhibit A-1:

"Anatomic diagnosis: Fracture of left femur; hemorrhagic infarct of both lungs; extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage." Tell us, Doctor, whether you are able to form an opinion as to the cause of Fred I. Babbitt's death.

Mr. Jarvis: Just a minute, Your Honor, I object to that question.

The Court: Well, he may answer the question first "yes" or "no."

A. Yes, sir, I think I can.

Mr. Savage: Just answer "yes" or "no."

Q. What is your opinion, Doctor? Just a moment, don't answer.

Mr. Jarvis: Now may I make the objection that the question does not cover the evidence nor the record in this case, nor does it cover the elements that have been introduced in evidence relating to either the disease or the death of Mr. Babbitt?

The Court: Well of course I do not know what there is in the hospital records, if they show anything about the disease. It is admitted by all parties—it is not in dispute he was afflicted for a period of years.

Mr. Savage: I will add the further element for the Doctor's consideration, assuming also that Fred I. Babbitt was afflicted with multiple sclerosis at the time and had been since 1926 or 1927, Doctor Jacobsen?

Mr. Jarvis: I make the same objection, Your Honor.

The Court: Objection will be overruled, exception allowed.

Q. Doctor, in your opinion what was the cause of Fred I. Babbitt's death? A. He died——

Mr. Jarvis: Could my objection go to all this?

The Court: Oh it does, certainly.

Mr. Jarvis: Without repeating it.

A. (Continuing) In my opinion he died from an infarction of the lungs and infarction of the pons, as a complication to a fractured femur, directly due to the fractured femur.

Q. Well, Doctor, in your opinion as a medical expert, can or may a fractured femur result from a fall?

A. A fractured femur may result from a fall. That is the common cause of a fractured femur.

Q. Doctor, in your opinion, would Fred I. Babbitt, considering now his history and the case records, die from the fractured femur and infarction, even if he had not been [217] afflicted with multiple sclerosis? Now don't answer until counsel has an opportunity to object.

Mr. Jarvis: Your Honor, this witness did not see Mr. Babbitt during his lifetime at all. The question is a hypothetical question. It is not based on the evidence in this case, and does not purport to contain all the elements that are before the Court and the jury in this case.

The Court: I think I shall sustain the objection to its form.

Q. Doctor, assume an individual of the age of 70 years; assume also that that individual is afflicted with multiple sclerosis and has been for fourteen or fifteen years. Assume further that that individual suffered a fall from which he sustained a fractured femur. Assume further, Doctor, that the fracture was reduced, the leg placed in a well splint, and for a period of time the man seemed to make satisfactory progress; assume that a week later he lapsed into a coma from which he never regained consciousness, and that he died approximately ten days later. Are you able to form an opinion, Doctor, as to whether the multiple sclerosis with which he had been afflicted, was a contributing cause of death?

Mr. Jarvis: Your Honor——

The Court: Answer "yes" or "No." [248]

A. Yes, sir, I think I can.

Mr. Jarvis: Just a minute, Doctor. I make the same objection that the question does not

cover, nor does it purport to cover all of the evidence, or the record in this case. I refer especially to Doctor Palmer's testimony in cross-examination.

Mr. Savage: I believe, Your Honor, the question fairly covers all the elements of the case, insofar as they have been introduced by the plaintiff, and also by the plaintiff's witnesses.

The Court: Perhaps that question should be broad enough to include all the elements set forth, whether they are accepted or not, in this autopsy report.

Mr. Savage: I am willing to do that.

Q. (Continuing): Assume also, that the autopsy report showed the following facts, that the body was one of a fairly well developed and well nourished white male. Skin generally is clear and free from eruption. The chest is symmetrical, the abdomen is on level with the chest. There is a slight discoloration over the left foot and the left leg and foot is everted.

When the body is opened the peritoneum is smooth and glistening and the intestines are of uniform caliber. The liver is at the usual position and the stomach is not distened. The spleen lies free. The [219] kidneys are small and when examined the capsules strip with difficulty leaving a markedly scarred contracted surface beneath. There is a marked diminution of the cortex of the kidney. When the chest is opened the lungs fail to meet in the midline. Both lungs are free and the lower lobe of the left lung shows some areas of consolidation. The lower lobe of the right lung show a large hemorrhagic infarct. When the heart is opened it is found filled with fluid and cloted blood. There are no valvular

changes. The coronary arteries are patent throughout. There is a marked sclerosis of the arch of the aorta with atheromatous plaques. The cut surface of the spleen show an intact capsule with an increase of the fibrous tissue.

When the calvarium is removed the dura stands high above the brain, due to fluid beneath. The pia-arachnoids show diffuse scarring with considerable fluid beneath. There is a diffuse whitish gray thickening of most of pia-arachnoid. When the brain is opened the ventricles are patent. The left ventricle appears slightly dilated in relation to the right. Sections of the cortex and the basal nuclei of the brain shows no abnormal changes. Sections of the brain stem and pons overlying the ventricles show an area of necrosis with a hemorrhagic coloring. This necrosis and coloring extends [250] for a distance of 1.5 cm and ends about the medulla, this is most marked on the left half though it has crossed the midline in some areas of the pons. The arteries of the basal vessels are markedly thickened and show many areas of sclerosis. The cerebellum show no noteworthy changes. The base of the skull is intact. There is no evidence of fracture in any portion of the skull. There is no evidence of gross hemorrhage.

Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis.

Doctor, assuming what I have read to you in addition to the history which I gave you, and the records of the Seattle General Hospital which

have been admitted here in evidence, are you able to form an opinion as to whether Fred I. Babbitt would have died from a fracture of the left femur, even if he had not been afflicted with multiple sclerosis?

Mr. Jarvis: Your Honor, I make—oh, he can answer yes or no.

A. Yes, I think I can.

Q. And Doctor, what is that opinion? [251]

Mr. Jarvis: Your Honor, I make the same objection, that the question does not cover the records in this case as established, nor the evidence that is in, and I make the objection to the form of the question.

The Court: I think the question should perhaps be framed slightly different—not limited to multiple sclerosis, but multiple sclerosis and the other conditions *that have been disclosed by the report that you just read, and the hospital records and I assume that was your intent to ask the question.*

Mr. Savage: It was. May I modify it in the language that Your Honor has used?

Q. Now Doctor, are you able to form an opinion as to whether he would have died from the complications of a left—or a fracture of the left femur, even though he had not—even though he had not afflicted with multiple sclerosis, or complications which might arise, dependent thereon?

A. Yes, sir, I think I can.

Q. Now, Doctor, what is your opinion in that respect?

Mr. Jarvis: I make the same objection.

The Court: Same ruling, and an exception allowed.

A. *I think Mr. Babbitt from the* direct complication of his injury, I believe that his multiple sclerosis had nothing [252] at all to do with his death.

Mr. Savage: Cross examine. (Tr. 105-111)

The serious objections to Dr. Jacobson's testimony are palpable and apparent. He never saw the insured or his body. His testimony and opinions were based on a conversation with Dr. Palmer, one of the insured's physicians and an examination of unspecified and undesignated hospital records, reading *part* of the autopsy report and hearing *some* of it discussed in the court room. This testimony was given practically at the close of plaintiff's case. The Doctor's testimony was based on conversations and opinions of another Doctor had and made out side of the court room, an examination of improperly admitted and unspecified hospital records, no part of which were read, and hearing some of the testimony in regard to the autopsy discussed in the court room. As a matter of fact, the Court (Tr. 106) in assisting counsel to frame his hypothetical question stated he did not know the contents of the hospital record. This question (Tr. 106) which was finally answered over objection did not purport to cover any circumstances regarding the fall, the duration of the hospitalization, the age and physical condition of Mr. Babbitt as disclosed by the autopsy and the hospital records and many, many other elements and facts upon which a hypothetical question should be based. In *U. S. v. Stephens, supra,* a hypothetical question was asked in a war risk insurance case where the facts were no more voluminous

than in the *Babbitt* case and yet the hypothetical question in that case covered three pages in the Federal Reporter System and was deemed insufficient by this Court. Dr. Jacobson not having any personal knowledge of the subject matter could only testify as to his opinions, and his opinion on this case (Tr. 103-106 inc. ) was elicited without taking into consideration the essential elements then in evidence; moreover, it was based on only part of them, on hearing some of them discussed in the court room and conversations and opinions of another expert outside of the court room. This first hypothetical question which was answered (Tr. 106) comes squarely within the following general language and cases:

> "* * * but a mixture of unspecified knowledge and what the witness has heard of testimony, or facts partly within his observation or knowledge and partly derived from others, or of facts in evidence and also the custom of a business does not constitute a suitable hypothesis." 32 C.J.S. 362.
>
> "A witness who has not heard all the material testimony cannot testify from what he has heard, from what he has seen and heard, or from what he has heard and a newspaper account of the evidence at a former trial of the same case which he has read, and evidence elicited by these forms of question has accordingly been rejected, even where the evidence of a witness is incorporated with facts hypothetically stated." 32 C.J.S. 364.

The Courts of this country have consistently held that an expert may give his opinion on facts assumed to have been established, but it is against every rule and principle of evidence to allow him to state his

opinion upon the conclusions and inferences of other witnesses. *Williams v. State* (1885) 64 Md. 384, 1 A. 887; *Mt. Royal Cab Co. v. Dolan* (Md.) 179 A. 54, 98 A.L.R. 1106.

In *Levine v. Barry, supra,* the Washington Supreme Court stated:

> "We think it should at once be conceded that the proper rule is that hypothetical questions *propounded on direct examination* should be based upon the testimony in the case. *But cross-examination should not be so limited.*"

This is followed by *Jones v. McQuesten, supra,* where the Court stated:

> "We recognize the rule that a hypothetical question *propounded upon direct examination* should be based upon the testimony of the case."

Also *Seibert v. Ritchie,* 173 Wash. 33, 21 P.(2d) 272, and Judge Simpson's dissenting opinion in *Newton v. Pacific Hwy. Trans. Co., supra*:

> "The testimony of experts based upon hypothetical questions cannot create an issue. * * * In this connection it is proper to note that hypothetical questions must be based upon the evidence in the case, not upon suppositions."

These principles written by Judge Simpson in his dissenting opinion were general principles of law sustaining his dissenting opinion, and were not questions of law otherwise decided or ruled upon in the majority opinion. The question is succinctly illustrated in *Howarth v. Adams Express Co.* (Pa.) 112 Atl. 536, where the Pennsylvania Supreme Court stated:

> "The question should have been excluded. An expert may express an opinion on an assumed

> statement of facts which the evidence intends to establish, *but not on what someone told him nor on what he learned from another doctor*, nor from the history of the case we know not what nor by whom communicated. An opinion based on such a question would naturally be misleading. The answer is also bad for it does not show what had been given the witness as the history of the case nor assume the truth of the evidence to which he had listened. * * * In such a case an expert opinion cannot be based upon facts not before the jury (Rogers on Expert Testimony, 2d ed., P. 82), nor on hearsay (Lawson on Expert Testimony, 2d. ed., P. 266)."

This statement squarely applies to the case before this Court. Dr. Jacobson's testimony was admittedly based on what someone told him, admittedly based on what he learned from another doctor, admittedly based on an unknown, unmarked number of hospital records. His opinion was palpably based upon facts not before the jury. Without going into detail the following synopsis of cases illustrate our position:

In *Chicago v. Chicago Rwy. Co.* (Ill.) 134 N.E. 44, the court stated in substance that if the testimony of an expert witness is based in a material degree upon elements which cannot legally be considered without separating those from the ones which may be legally considered, the opinion is incompetent.

In *Fraser v. City of Geneva*, 203 Ill. App. 566, the court stated that the testimony of a physician giving his opinion as to the cause of death based in part upon what he was told by another party, *but not stating*

*what such other party told him,* held improperly admitted in an action to recover damages for such death.

In *Wigginton v. Wigginton's Ex'r.* (Ky.) 266 S.W. 245, the court emphatically laid down the rule that expert opinion must be based upon and relate to facts proved in case.

In *Illinois Cent. R. Co. v. Townsend* (Ky.) 267 S.W. 61, the same court stated that expert testimony of a physician consisting entirely of his opinion derived from statements of plaintiffs during examination made for purpose of testifying, is incompetent.

In *Cardinale v. Kemp,* (Mo.) 247 S.W. 437, the Missouri court also stated that expert testimony must be predicated on facts and conditions conceded to be true or existing or assumed to be established by other testimony, thus excluding the possibility of basing one opinion on another opinion.

In *Croizer v. Minneapolis Street R. Co.* (Minn.) 118 N.W. 256, the court held that where the opinion is supposed to be based upon the evidence in the case as heard by the witness it is rendered inadmissible by matters learned out of court.

In the recent case of *Southern National Insurance Co. v. Hoggie* (Ark.) 174 S.W.(2d) 934, the court stated that in an action on a life policy, physicians testimony as to insured's health based entirely on view of the record of insured's at a sanitarium and a diagnosis of another physician, was properly excluded.

Counsel for plaintiff then attempted to enlarge on the hypothetical question which, of course, could not cure the previous error. This started out (Tr. 107) as

a hypothetical question based on certain assumptions and based on a reading of the autopsy report but did not purport to cover any part of the hospital records, Dr. Rex Palmer's Certificate of Cause of Death (Df. Ex. A-2), nor many of the other material elements in the case. After asking three or four questions the one that was finally answered was modified by the Court to be based upon the autopsy report and the hospital records without further specifying or enlarging on them, and the Doctor was then asked if the insured would have died even though he had not been afflicted with multiple sclerosis. From any point of view the question is palpably objectionable for the reasons stated. As a matter of fact, the assumption is not correct because the evidence showed that the insured was suffering from disease, defect and bodily infirmity. The question did not purport to come within the terms of the policy nor to cover the evidence in the case.

**Specification of Error 5**

5. The Court committed errors of law during the trial in addition to those hereinabove specified by

(a) Failing to direct the jury to bring in a verdict for the defendant at the conclusion of the plaintiff's testimony.

(b) By overruling defendant's alternative motion for judgment notwitstanding the verdict or for new trial.

(c) By entering judgment for the plaintiff.

All of the points raised here are covered by the foregoing argument.

We respectfully believe that there was error in the trial of this cause as argued herein and that it should be remanded with directions to dismiss this action, or if refused, that a new trial be granted.

Respectfully submitted,

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and
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